

224484

BEFORE THE SURFACE TRANSPORTATION BOARD

---

Ex Parte No. 676

---

RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. § 10709

---

COMMENTS OF CSX TRANSPORTATION, INC.

---

CSXT appreciates this opportunity to submit written comments on the Board's proposed rule ("Proposal"), and understands that the Board is engaged in an effort to help carriers and shippers alike in clarifying relationships and, in particular, minimizing disputes between railroads and their customers over whether relationships are contractual or regulated common carriage in nature.

As evidenced by the first round of responses in these proceedings, as well as in the prior proceeding, Ex Parte 669, the issues being raised are quite difficult and do not easily lend themselves to resolution. CSXT agrees with the Board that there is real value in adding clarity to contracts, including unilateral contract offerings that shippers accept without traditional signature. CSXT believes that the Proposal as a whole, and in particular the decision to omit the "informed consent" requirement, is a positive and constructive step forward.

In this vein, these written comments have a three-fold purpose: (1) to support the basic aim of the Board's Proposal, (2) to suggest modifications to the two-prong evidentiary inquiry that may better align with the jurisdictional scope of 49 U.S.C. §

10709, and (3) propose changes to a few of the Proposal's details in the interest of good *railroad-customer relations*

## **I. THE PROPOSAL**

To address the need for a clear demarcation between tariffs and contracts, the Board has proposed that where the "disclosure statement" is placed on the top of the first page of the agreement, the agreement is conclusively presumed to be a contract under 49 U S C § 10709 and, therefore, the contractual relationship would lie outside of the Board's jurisdiction. Absent this statement, however, the Board would exercise jurisdiction unless the following two prongs of a clear and convincing evidentiary standard are met: (1) the parties intended to enter into a rail transportation contract, and (2) the shipper was made aware that it could request a common carrier tariff that would be subject to STB jurisdiction.

## **II. JURISDICTIONAL ISSUE WITH SECOND PRONG**

The clear, jurisdictional directive of 49 U S C § 10709 is that STB jurisdiction does not lie where the rail carrier and the shipper enter into a contract. At issue in this jurisdictional question is whether the parties intended a contract by determining whether the bedrock elements of contract formation (offer, acceptance, consideration, etc.) are in place. Under the Proposal, however, where a disclosure statement is absent, the establishment of a contract by clear and convincing proof (first prong) is insufficient to determine the Board's jurisdiction; the Board proposes to go a step further and determine whether, by clear and convincing proof, the shipper "was made aware" of its statutory right to request a common carrier tariff. This second prong appears to present a jurisdictional quandary.

Consider that a party advocating the existence of a contract might succeed in showing, by clear and convincing evidence, that the parties entered into a contract, but failed to clearly and convincingly show that the shipper "was made aware" that it could request a common carriage tariff. There, the Board would be in the seemingly awkward position of exercising jurisdiction over an agreement that the Board has already ruled to be, by clear and convincing proof, a contract. Exercising jurisdiction over an agreement that the Board has ruled to be a contract would seem to be in direct conflict with § 10709.<sup>1</sup>

CSXT, therefore, proposes a slight modification to the evidentiary inquiry that would better align the Proposal with the Board's jurisdiction as established by § 10709. CSXT suggests that the presence of the statement would establish a rebuttable presumption of a contract, which could only be overcome by clear and convincing evidence that the parties did not intend a contract.<sup>2</sup> On the other side of the coin, the absence of a statement would cause a rebuttable presumption that there is no contract, which could only be overcome by clear and convincing evidence that the parties intended a contract. CSXT respectfully suggests that this modification would allow the Board to establish the desired clear

---

<sup>1</sup> CSXT notes that there are two further difficulties with the second prong. First, it is unclear what proof would be required to show "that the shipper was made aware" of its right to a common carriage rate. Would the proof be directed at what precautionary steps were taken by the rail carrier in ensuring that the shipper was aware of its statutory alternatives during the course of negotiations? Or would the proof be directed at showing that the shipper, in fact, had knowledge of its statutory alternatives? The Proposal does not sufficiently explain. Second, an inquiry into whether the shipper "was made aware" of its statutory rights seems misplaced given that (a) shippers are sophisticated commercial enterprises that are frequently represented by their own lawyers, and well acquainted with complex business transactions, and (b) shippers are, as a matter of law, presumed to know their statutory rights, and thus the party carrying the evidentiary burden would be forced to prove a fact that is already presumed in law. See, e.g., *Velez-Lozano v. Immigration and Naturalization Service*, 463 F.2d 1305, 1308 (D.C. Cir. 1972) (recognizing the oft-expressed maxim that "every man is presumed to know all the law").

<sup>2</sup> Presumably, it would be no easy task to overcome this burden given the presence of a statement indicating that the agreement is, in fact, a contract. A state or federal court judgment that the agreement at issue is not a contract would obviously present the Board with clear and convincing evidence that the parties did not intend a contract.

demarcation between contractual and regulated common carrier relationships without compromising the well-established jurisdictional boundaries of § 10709

### **III. SUGGESTIONS ON PROPOSAL DETAILS**

#### **A. The Prefatory Phrase, "Disclosure Statement" is Counter-Productive**

First and most importantly, CSXT asks the Board to reconsider whether there truly is a need for the prefatory phrase, "Disclosure Statement." The phrase tends to inject an unnecessary element of "warning," and perhaps even an adversarial tone, into what is, by definition, an agreement voluntarily entered into between two willing parties. Customers are usually sophisticated commercial enterprises—not unsophisticated individual consumers. Even smaller rail customers are frequently very sophisticated business people, often represented by their own lawyers, and well acquainted with complex business transactions. The very term, "Disclosure Statement" seems to convey a message that is more controversial than constructive. CSXT urges that the Board omit the phrase "Disclosure Statement" altogether and allow the language of the statement to speak for itself. In the event the STB determines that using a prefatory phrase would better serve its purposes, CSXT suggests a more neutral title such as "STB Jurisdictional Statement."<sup>1</sup>

#### **B. Prospective Effect on Subsequent Amendments and Supplements**

CSXT seeks clarity on amendments or supplements that are effectuated after the Proposal is adopted. Under the Proposal, "all subsequent contracts, amendments and supplements, even those that attach to contracts signed before the effective date of the

---

<sup>1</sup> CSXT also recognizes that the statement does not distinguish between exempt and non-exempt traffic when it instructs that shippers have a right to request a common carriage rate. The only practical way to avoid the pitfall of an inadvertent omission of the statement is for CSXT to incorporate it into all of its contracts—exempt, non-exempt, and exempt/non-exempt combinations. CSXT suggests, therefore, that the statement should indicate that the right to request a common carriage rate is applicable only to regulated traffic. CSXT is also agreeable to the short statement proposed by the NS. See STB Ex Parte No. 676, *Comments of Norfolk S. Railway Co.*, at 10 (served Jan. 29, 2009).

new rule, would need to contain the disclosure statement in order to be conclusively presumed to be a contract under 49 U.S.C. § 10709 (Notice, *Rail Transportation Contracts Under 49 U.S.C. § 10709*, Ex Parte 676, at 7 (served Jan. 6, 2009)) (“Notice”). Would a subsequent amendment that omits a disclosure statement subject the entire underlying, pre-existing contract to potential STB jurisdiction, no matter the substance or purpose of the amendment? Or, are only the terms of the amendment itself subject to potential STB jurisdiction? CSXT believes that, of the two, the latter is the more sensible approach. To do otherwise might conceivably subject a substantial, long term transportation contract with many agreed upon rate and volume terms to a rate case only because an amendment relating to one lane of traffic, or operating arrangements (e.g., where to drop off cars), or service commitments (e.g., car supply) was mistakenly executed without the statement.

Consistent with CSXT’s suggestion above, where the subsequent amendment includes a statement, it is entitled to the rebuttable presumption that it is contractual in nature and the Board does not have jurisdiction. On the other hand, where the subsequent amendment does not have a statement, there would be a rebuttable presumption that the amendment is not contractual and thus subject to STB jurisdiction. In each instance, clear and convincing evidence would be necessary to overcome the presumption.

### **C. Placement of the Statement at the Top of the First Page**

The Proposal also states that the disclosure statement “should be placed prominently at the top of the first page of the agreement, in type size at least as large as the type used for the body of the agreement” (Notice at 5). CSXT seeks clarification with respect to contracts that begin with a cover page and, in some instances, a number of preliminary

pages that precede the first page of the body of the agreement, such as a table of contents, appendices and the like. In such instances, must the disclosure statement be placed at the top of the cover page, or the first page of the body of the agreement? CSXT suggests that some flexibility on where the statement should appear would be helpful.

#### **D. Contractually Agreed Upon Preferences**

Finally, the proposed language in the “disclosure statement” states in relevant part “[c]ontract arrangements are generally not subject to challenge before the Surface Transportation Board (“STB”), but can be enforced in a court of competent jurisdiction.” (Notice at 8.) For clarity’s sake, and for the purpose of preserving the parties’ contractual preference for jurisdiction, venue, or alternative methods of resolution, CSXT suggests that the latter part of this sentence be altered to “can be enforced in a court of competent jurisdiction or through alternative dispute resolution processes agreed upon by the parties.”

[REMAINDER OF COMMENTS FOLLOWS ON NEXT PAGE]

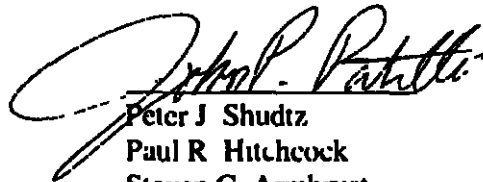
#### **IV. CONCLUSION**

CSXT supports the Board in its efforts to draw a clear line of demarcation between contractual and common carrier relationships. CSXT agrees that an appropriate way to achieve this goal is by incorporating a statement on the first page of the transportation contract that would clearly distinguish the document as a contract. We respectfully suggest that the slightly modified evidentiary inquiry as well as the other changes herein described furthers the desired goal of relationship clarification without compromising the jurisdictional scope of § 10709, or unnecessarily disrupting good railroad-customer relations.

Respectfully submitted,

February 5, 2009

500 Water Street  
Jacksonville, Florida 32202

A handwritten signature in black ink, appearing to read "John P. Patelli", is written over a horizontal line.

Peter J. Shudtz  
Paul R. Hitchcock  
Steven C. Armbrust  
John P. Patelli  
Attorneys for CSX Transportation, Inc